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June 12, 1979

Mr. Richard Rabago
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ARIZONA ATTORNEY GENERAL

Re: I79-154 (R78-348)

Dear Mr. Rabago:

We are writing in response to your letter of September 22, 1978, wherein you requested our opinion as to an employee's rights during the "Employee Problem-Solving Procedure", as detailed in the State Personnel Manual, § 3.40 et seq. Specifically, you have asked whether an employee who is protesting a formal letter of reprimand placed in his permanent employee record must be accorded the following rights:

1. The right to be represented by a third party during an investigative interrogation, and, if so, the right to be advised that representation is allowed;
2. The right to obtain a copy of the charges against him and/or the transcript of the interrogation;
3. The right to cross-examine an accuser;
4. The right to an impartial hearing.

Generally, it is our opinion that the "Employee Problem-Solving Procedure" must be administered in a fair and orderly manner, consistent with its stated objectives, but that the rights to which an employee is entitled are limited.¹

¹ See Part III, infra.

I. Statutory Authority for Grievance Procedures

Among the enumerated powers and duties of the Assistant Director for Personnel pursuant to A.R.S. § 41-763 is the "authority for developing and administering a program of personnel administration for the state service in conformance with the rules and regulations of the personnel board." (Subsection 2.) The Personnel Board has the duty to promulgate rules and regulations relating to personnel matters, pursuant to A.R.S. § 41-782.1 (amended 1978). The rules of the Personnel Board must include the "establishment of a plan for resolving employee grievances and complaints." A.R.S. § 41-783.16 (amended 1978.)²

The Rules of the Personnel Board³ grant to the Assistant Director for Personnel the following authority under R2-5-02.I:

I. Problem-solving procedure or procedure for settling grievances:

1. The Assistant Director shall establish a grievance procedure in cooperation with the State agencies through which employees may obtain consideration of grievances or problems in matters over which the appointing power has complete or partial jurisdiction and for which redress is not provided elsewhere in these Rules. The purpose of the grievance procedure is to afford employees a written and systematic means of obtaining further consideration of grievances after every reasonable effort has failed to resolve them through informal discussions initiated with their immediate supervisor.
2. The grievance procedure of each State agency shall conform to the established procedure.
3. The employee may appeal to the Assistant Director from a decision of the agency head in a particular grievance matter. The Assistant Director may refer to the Board any such appeal which he is unable to resolve.

² A separate provision, A.R.S. § 41-785, provides for an appeal procedure in the event of employee dismissal, suspension or demotion. Causes for dismissal or discipline are detailed in A.R.S. § 41-770.

³ A.C.R.R. R2-5-01 et seq.

Pursuant to this grant of authority, the Assistant Director has established the "Employee Problem-Solving Procedure" set forth in the State Personnel Manual, § 3.40 et seq.

II. Constitutional Considerations

The Supreme Court stated, in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), that due process requirements apply to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.⁴ To decide if due process requirements are applicable, the nature of the interest at stake must be examined.⁵

The Supreme Court set forth guidelines for determining the meaning of "liberty" and "property" for due process purposes. At the very least, a deprivation of liberty occurs when loss of present employment is coupled with a stigma or disability foreclosing future employment opportunities or serious damage to an employee's reputation and standing in the community. A deprivation of property occurs when an employee loses an interest in a specific benefit of employment that he has already acquired. There must exist rules or mutually explicit understandings that support the employee's claim of entitlement to that benefit.

Relying on the Roth case, the Arizona Court of Appeals held, in Dixon v. Osman,⁶ that a job dismissal without a legitimate claim of entitlement to that job based on contract, statute or regulation, is not a protectible interest.⁷ The

⁴ The case involved a first year teacher who was notified that he would not be rehired, without any explanation for the action taken. Although the teacher contended he was entitled to a hearing with respect to dismissal, the Court held that he had acquired no interest that mandated due process protection.

⁵ Id. at 571.

⁶ 22 Ariz.App. 430, 528 P.2d 181 (1974).

⁷ In Smith v. The Pima County Law Enforcement Council, 113 Ariz. 154, 548 P.2d 1151 (1976), the court held, relying on Roth, that a county employee was entitled to a hearing on procedural due process grounds to clear his good name when he was fired from his job on charges that damaged his reputation. Cf. Perry v. Sundermann, 408 U.S. 593 (1972), a companion case to Roth, wherein the Court held that a claim of entitlement need not be based on a written contract. See also McClanahan v. Cochise College, 25 Ariz.App. 13, 540 P.2d 744 (1975), concerning the due process requirements applicable to a dismissal under a contract.

situation at hand, which involves only a letter of reprimand rather than a job dismissal or a loss of benefits, is thus not within the purview of Fourteenth Amendment guarantees of due process.⁸

III. Employee Disciplinary and Grievance Procedures

A grievance procedure for employees has been established by the State and is set forth in the State Personnel Manual. The rights of employees under the Employee Problem-Solving Procedure, § 3.40 et seq., must be considered in concert with the State policy and purpose for the procedure:

Policy and Purpose. It is the policy of the State of Arizona to encourage a harmonious and cooperative relationship between each agency and its employees, recognizing the dignity and value of the individual. Toward this end, it is the intent of the Personnel Board that this procedure settle employee problems fairly, quickly and at the lowest possible organizational level.

The primary objectives seem to be fairness in the procedure and quick resolution of problems.

Your first question relates to an employee's right to representation by a third party during an investigative interrogation⁹ and the notice of that right to be given to the employee. State Personnel Manual § 3.45 provides that "employees shall be permitted representation of their own choosing at any step in the procedure after step 1a." (Emphasis added.)¹⁰ The section details the steps an employee must take to notify supervisors of representation. An agency's responsibility for notice to employees of their rights is covered by § 3.46, pursuant to which the agency must provide employees with copies of the grievance procedure. There is no additional obligation to notify an employee of the rights contained therein.

⁸ Although the employee may encounter difficulty advancing in a job status because of the reprimand, advancement is not an entitlement, but clearly is subject to periodic evaluation as specified in A.R.S. §§ 41-783.3 through 41-783.6.

⁹ You note that the investigation in the case at hand is authorized by A.R.S. § 46-132.

¹⁰ § 3.47 (oral discussion with immediate supervisor).

Your second question concerns an employee's accessibility to documents relating to his reprimand. Considering that fairness is the standard for the grievance procedure and that a formal reprimand will be part of an employee's permanent record, an employee should have the right to obtain a copy of the charges against him and, certainly, a transcript of his own interrogation. The employee must be furnished with enough information to enable him to effectively present his own version of the facts that are forming the basis for the disciplinary action. In some instances this may involve releasing names of complainants and informants to the employee, but any possible chilling effect this may have on the complaint process is outweighed by the potential harm that a letter of reprimand may cause an employee.¹¹

In response to your third question, an employee does not have a right to cross-examine his accuser. Review procedures at all stages are informal. The agency head, pursuant to § 3.48 (Step II), has the following responsibility:

The agency head or his representative shall conduct a meeting within 15 working days, at which the employee's problem shall be presented. An informal record of the meeting, including such information as date, place, subjects discussed, and participants, shall be maintained.

The employee has no right to attend that meeting.

¹¹ Furthermore an employee has access to his individual personnel record under § 7.40(b). Among the items to be contained in an employee's employment file is "(e) miscellaneous correspondence with or about the employee, including any letters of commendation or reprimand." § 7.20. This would cover all written communications concerning the events resulting in the reprimand.

(A file developed for use of the "Employee Problem-Solving Procedure is maintained separately pursuant to §§ 3.46 and 7.30.) Information in the file which does not result in official action should be appropriately notated as to the reasons why action was not taken.

Mr. Richard Rabago
June 12, 1979
Page 6

The Assistant Director's reviewing officer has the discretion, under § 3.49 (Step III), to provide for a meeting with the employee and the agency head. The terms of the meeting are as follows:

Every review meeting shall be confidential, unless the employee and the agency head both request that it be open to the public. The meeting shall be informal and technical rules of evidence and procedure shall not apply. The reviewing officer shall be the sole judge of the manner in which the review meeting is to be conducted and as to what evidence will be received.

The employee, then, is subject to whatever procedural and evidentiary standards the reviewing officer, in his discretion, permits.

Finally, you ask whether A.R.S. § 41-782.01 mandates a hearing for an employee. It is our opinion that it does not. Subsection A provides that "[u]pon complaint to the board that a rule of the board is being violated . . . the board may investigate the complaint." (Emphasis added.) The Board may, in exercising its discretion, choose not to investigate the complaint and thus not hold a hearing.

Sincerely,



BOB CORBIN
Attorney General

BC/mm